



U.S. Department of Justice
UNICOR
Federal Prison Industries, Inc.

Washington, DC 20534

July 14, 2003

ATTN: Ms. Susan Schneider
Defense Acquisition Regulations Council
OUSD (AT&L) DP (DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

Dear Ms. Schneider:

We appreciate the opportunity to comment on the proposed rule, DFARS case 2002-D003, to implement Section 811 of the National Defense Authorization Act for Fiscal Year 2002 and section 819 of the National Defense Authorization Act for Fiscal Year 2003. These sections, codified at 10 U.S.C. § 2410n, relate to the Department of Defense (DOD) purchasing of products from Federal Prison Industries (FPI or trade name UNICOR). As you know, FPI is a self-sustaining government corporation created by Congress in 1934 to provide work and training opportunities to Federal inmates. Since its inception, FPI has provided a vast array of products to DOD, making it one of FPI's longest standing and extremely valuable customers. As such, we remain committed to providing DOD with high quality products that best meet your agency's needs.

Throughout the process of implementing sections 811 and 819 FPI has made comments regarding the application and implementation of the DOD's new mandate with existing laws and regulations. We were pleased to note that many of the comments made during the comment process have been addressed in the proposed rule. This proposed rule stands as a reflection of the spirit of cooperation between our agencies and, in many ways, is an improvement upon the interim rule.

We have the following comments on this proposed rule:

First, Sections 811 and 819 require DOD to conduct market research and determine whether FPI's product is comparable. We were pleased to find, in the proposed rule, additional guidance regarding this comparability determination. Specifically, that contracting officers must make a written determination that

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includes supporting rationale. This requirement does assuage many of the concerns addressed in our previous comments to the interim rule, and we believe this is an important step to ensure that these studies are being conducted and are documented. It has been our experience that written comparability studies are not being conducted in many cases. Even if these are being conducted they are not routinely made available to FPI. These results, however, are crucial to FPI's ongoing effort to develop products which best meet DOD's needs. It is our hope and expectation, therefore, that comparability determinations are properly conducted in the future and that DOD will find it mutually beneficial to provide FPI with the results.

Additionally, since the passage of Sections 811 and 819, we have seen instances in which DOD entities have inappropriately combined comparability determinations with competitive procedures, thus thwarting the intent and plain language of sections 811 and 819. As indicated in DOD's response to comments, the first step is to determine whether FPI's product is "comparable" to private sector offerings. The term "comparable" is defined with its common dictionary meaning ("having sufficient features in common with something else offered to afford comparison". At this first step, the FPI product does not need to be the "best available." If FPI's product is determined comparable, the DOD customer is to follow the policy at FAR 8.602(a) which describes FPI's mandatory source procedures. Under these procedures, the DOD customer is required to purchase the product from FPI. If the FPI product is found to be comparable, DOD customers, like any other federal entities, are entitled to seek a waiver of the mandatory source requirements pursuant to FAR 8.605.

If the FPI product is determined not comparable, competitive procedures are to be used with FPI being afforded an opportunity to submit a timely competitive offer. It is not until this second stage that the best value determination is to be made. We would ask that the rule emphasize the two-step nature of the procedures, add the definition of "comparable" to 208.601-70, and clarify that DOD purchasers may request a waiver if an FPI product has been determined to be comparable.

Second, we want to clarify the comment made in the proposed rule and reiterate the proper interpretation of Section 819 and FPI's statute with regard to a decision of a federal agency on how to structure a contract for administrative convenience. This is particularly relevant to the comment #12 on architect-engineer contracts. We concur with the response to Comment #12 that Section 819 added text prohibiting DOD from requiring a

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contractor to use FPI as a subcontractor. This is to clarify that agencies may not circumvent the requirement to conduct market research for such projects where contractors are being utilized and the requirement to utilize FPI if the FPI product is deemed to be comparable. We agree with the conclusion that the requirements of 10 U.S.C. 2410n are imposed on the Government, not the contractor. As such, for any purchases involving FPI product, it will be incumbent upon DOD to follow the necessary procedures. For instance, DOD would not be permitted by law to procure office furniture as part of a consolidated or prime contract for the construction or renovation of a building, if such a contracting method is used to preclude the necessity for a comparability determination or competitive procedures under sections 811 and 819. Regardless of whether the product is provided to the DOD directly or indirectly, a comparability determination and competitive procedures are required any time products offered for sale by FPI are purchased for the DOD. If FPI is found to be comparable, or is the competitive choice, then DOD is required to purchase from FPI, regardless of the procurement method. In such cases, the purchase would need to be made directly by DOD, following the strictures of sections 811 and 819, and not by the sub-contractor. The requirements of Sections 811/819 and FPI's statute apply irrespective of procurement method.

Lastly, we note that the proposed rule states that an analysis has been prepared under the Regulatory Flexibility Act, concluding that the rule may have a significant impact on small businesses. It states the rule could benefit small business concerns that offer products comparable to FPI. As we have previously noted, this analysis fails to state that the rule could also significantly affect FPI as well as the many small business concerns that supply goods or services to FPI in support of making its products. DOD's analysis should consider and include the impact on FPI and the small business concerns that support FPI. In FY 2002, FPI purchased over \$502 million of goods or services from private sector companies, and over sixty two percent of such purchases were from small business concerns. Such purchases from small businesses are significant and should be also analyzed as well. The implication of the remarks under Paragraph B is that small businesses will benefit because they may get business that FPI would not retain. Given our efforts as a Federal agency to support small businesses, we believe that any such positive effect for small businesses would be more than offset by the negative effects on FPI's current small business partners. Without debating the specific net outcome, we believe it is only fair to indicate that small businesses who currently

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derive business from FPI may be negatively affected, as other small businesses may be positively affected.

We appreciate your agency's consideration of these comments. Should you have any additional questions, please contact me at (202) 305-3500.

Sincerely,

Marianne S. Cantwell

Marianne S. Cantwell
General Counsel
Federal Prison Industries, Inc